No. 17-387

In The Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF AMICI CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, PUEBLO OF LAGUNA, PUEBLO OF SAN FELIPE, ET AL., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

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INTEREST OF AMICI CURIAE[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests. Since 1944, NCAI has worked to protect the rights of Indian tribes and to improve the welfare of American Indians. To that end, it has advised federal, state and tribal governments on a range of issues, including tribal sovereign immunity.

NCAI represents more than 250 Indian tribes and Alaska Native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies and histories. In recent years, NCAI member tribes have defended numerous lawsuits seeking to seize tribal property, both real and personal. *See Wisconsin Dep't of Natural Res. v. Timber and Wood Prod. in Sawyer Cnty.*, No. 2017AP181, 2017 WL 6502934 (Wis. Ct. App. Dec. 19, 2017) (dismissing *in rem* action seeking to cut down and remove standing timber on tribally owned fee lands located within the reservation of the Lac Courte Oreilles Band of Lake Superior Chippewa); *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977 (N.M. 2016) (dismissing lawsuit seeking to establish the validity of an easement across tribally owned fee land); *Armijo v. Pueblo of Laguna*, 247 P.3d 1119 (N.M. Ct. App. 2010) (dismissing quiet title claim

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

against Pueblo based on alleged prior adverse possession).

The Association on American Indian Affairs ("AAIA") is a 95-year-old advocacy organization founded to protect all aspects of tribal sovereignty that sustain tribal cultures.

NCAI, AAIA, and the individual amici Indian tribes have a strong interest in preserving time-honored principles of Indian law, preventing the emergence of new threats to tribal land, and averting the drastic curtailment of tribal sovereign immunity that the Respondents and the Washington courts have advocated in this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Upper Skagit Indian Tribe ("Tribe") is a federally recognized tribe in Washington State. In the Treaty of Point Elliott, 12 Stat. 927 (1855), the Tribe ceded a large section of land in northwestern Washington to the United States. *Washington v. Wash. State Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661 n.1 (1979). Other than the Tribal cemetery acquired through a congressional appropriation in 1913, *see* 38 Stat. 77, 101 (1913), the Tribe was landless for more than 100 years. In 1976, the American Indian Policy Review Commission noted that "[b]ecause they lack a landbase from which to operate, [Tribal members] are severely impaired in their ability to develop a [T]ribal

economy." Final Report to the American Indian Policy Review Commission: Report on Terminated and Non-Federally Recognized Indians 182 (1976) (hereinafter "AIPRC Report").

It was not until 1981 that the Secretary of the Interior proclaimed approximately 74-acres of noncontiguous land to be the Tribe's initial reservation. Upper Skagit, Wash., Establishment of Reservation, 46 Fed. Reg. 46,681 (Sept. 21, 1981). More recently, the Tribe has acquired fee parcels on the open market in an attempt to rebuild a small land base. Bruce G. Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* 98-99 (2001). As part of these land recovery efforts, in 2013, the Upper Skagit Indian Tribe purchased a 39.56-acre parcel of undeveloped land in Skagit County from the title holders of record. *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 571 (Wash. 2017). This parcel is located in the Tribe's aboriginal territory, adjacent to lands that the United States already holds in trust for the Tribe's benefit. *Upper Skagit Indian Tribe v. Lundgren*, Appellant's Opening Brief, 2015 WL 10438675, at *2 (Oct. 2, 2015). One of those adjacent trust parcels is the site of a Tribal cemetery. *Id.*

More than one year after the Tribe purchased this property, the Respondent Lundgrens brought a quiet title action, claiming to have adversely possessed the southern portion of the parcel. Respondents have not developed or cultivated this land; their only claim to adverse possession is based on the location of an overgrown barbed-wire fence, and an assertion that they

removed fallen or dead trees from the area. *Lundgren*, 389 P.3d at 571.[2]

If the United States, instead of the Tribe, had purchased the fee land in question, this lawsuit presumably would have been dismissed by Washington courts. Over the past 60 years,[3] this Court has repeatedly stated that federal sovereign immunity cannot be evaded by sleights of hand such as naming a governmental official, or bringing an *in rem* action against government property. *E.g.*, *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 280-86 (1983) (dismissing North Dakota's suit seeking to quiet title to federal lands that supposedly passed into state ownership pursuant to the equal footing doctrine); *Malone*, 369 U.S. at 643-45 (holding that sovereign immunity barred an action for ejectment against a U.S. Forest Service official, where private plaintiffs claimed they

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[2] It is curious that the Washington Supreme Court highlighted the trial judge's statement that "this is as clear as a case [of adverse possession] as I've had on the bench." *Lundgren*, 389 P.3d at 572. In many jurisdictions, the facts in this case would not be sufficient to establish adverse possession. *See, e.g.*, *First Congregational Church of Enosburg v. Manley*, 946 A.2d 830, 835-37 (Vt. 2008) (mowing grass, parking cars, and constructing a wire fence used to contain animals was insufficient use to establish adverse possession); *Lake v. Severson*, 993 P.2d 309, 310-12 (Wyo. 1999) (pasturing livestock and occasional mowing is not enough to place property owner on notice of adverse use, and fence erected on property was a "convenience fence" not a "boundary fence" and therefore was insufficient to support adverse possession claim).

[3] "[I]t is fair to say that to reconcile completely all the decisions of the Court in this field [of sovereign immunity] prior to 1949 would be a Procrustean task." *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962).

were the rightful owners of land purchased by the United States). If the government is the real party in interest, the suit is barred regardless of the named defendant, unless a clear and unequivocal waiver has been granted.[4] *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949).

Congress may pass legislation that waives the sovereign immunity of the United States. But despite all of the resources (both money and land) it has at its disposal, even the United States has not seen fit to authorize suits such as that filed by the Lundgrens. The only adverse possession claims that can be asserted against the federal government are based on color of title (i.e., a defective deed, relied upon in good faith by the person claiming ownership through adverse possession), and even then, such suits are severely restricted. *See, e.g.*, Quiet Title Act, 28 U.S.C. § 2409a(n) ("Nothing in this section shall be construed to permit suits against the United States based on adverse possession"); Color of Title Act, 43 U.S.C. § 1068 (providing that when a tract of public land has "been held in good faith and . . . under claim or color of title for more than twenty years," and the land has (1) either been cultivated or improved, or (2) taxes have been paid on the property, then the claimant can purchase the land from

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[4] A government official may be sued directly over a dispute involving federal property only if the lawsuit alleges the official's actions are unconstitutional or exceeded his statutory authority. *Block*, 461 U.S. at 281; *Malone*, 369 U.S. at 646-48. These exceptions are inapplicable here, as Respondents neither named a tribal official as a defendant, nor alleged that any tribal official had violated federal law.

the United States for its appraised value). Here, the Lundgrens apparently adversely possessed in bad faith (i.e., with knowledge that they did not own the land in question),[5] and therefore, they would not be able to bring a quiet title action against the United States if it were the property holder.

The result should be no different for the Upper Skagit Indian Tribe. Like federal and state immunity, tribal sovereign immunity is a creature of common law. It is derived from the inherent sovereignty of Indian tribes, which predates the U.S. Constitution. *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58 (1978). In the past, this Court has always concluded that the scope of tribal sovereign immunity is coextensive with the scope of federal and state immunity. Consequently, tribal sovereign immunity precludes an action where the tribe is the real party in interest, such as where a lawsuit seeks to divest it of ownership of real property. *See, e.g.*, *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017) (concluding that "[t]here is no reason to depart from these general rules [of state and federal sovereign immunity] in the context of tribal sovereign immunity" and noting that regardless of the named defendant, the

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[5] The Lundgrens' deed does not contain an incorrect description of the land, and they did not pay taxes on the disputed property. When approached by the Tribe, instead of claiming that the land was theirs, the Lundgrens immediately asked if the Tribe would be willing to trade or sell the land to them. The Lundgrens only claimed to have adversely possessed the property later, after the Tribe refused to sell or trade the disputed section. Declaration of Robert Hayden, ¶¶ 7, 12.

real question was whether the lawsuit would "require action by the sovereign *or disturb the sovereign's property*") (emphasis added). The only exceptions to this rule are where Congress has unequivocally abrogated tribal immunity, or where the tribe itself has granted a clear and express waiver. *C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Neither abrogation nor waiver is alleged here.

This Court should not carve out a new exception to tribal sovereign immunity for quiet title actions or other *in rem* proceedings. One of the main purposes of sovereign immunity is to safeguard government property. That purpose has even greater force for Indian tribes, which have far fewer resources than state and federal governments, and which already have been dispossessed of much of their land and resources. *See Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895) (upholding tribal sovereign immunity while recognizing that the Choctaw Nation "would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to [bring] against it"); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity and the Construction of Tribal Sovereignty*, 51 B.C. L. Rev. 595, 629 (2010) (noting that "[t]he fragile finances of many tribes . . . give [protection of the public money] added force in the tribal context. One large judgment [can] threaten a tribe's existence"); *see also* Section IV *infra* (discussing land dispossession). Furthermore, settled precedent recognizes that Congress is the branch of government

entrusted with authority over Indian affairs, and therefore, Congress is the appropriate body to accommodate the competing policy and reliance concerns. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014). Congress routinely considers issues involving tribal sovereign immunity, yet it has chosen not to abrogate such immunity here. *See* Section III *infra*. For these reasons, the Washington Supreme Court's decision should be reversed.

ARGUMENT

I. FEDERAL, STATE, AND TRIBAL SOVEREIGN IMMUNITY ARE ROOTED IN COMMON LAW AND SIMILAR IN SCOPE.

"When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent." *Alden v. Maine*, 527 U.S. 706, 715 (1999). But it was not just English common law that recognized as settled the doctrine that the King could not be sued. Rather, "the whole civilized world concurred" in the principle that a sovereign could not be subject to suit without its consent, even for activities occurring outside of his territory. *The Schooner Exchange v. McFadden*, 11 U.S. 116, 137 (1812).

"The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715. *See also Schooner Exchange*, 11 U.S. at 137-38 (subjecting a foreign sovereign to suit would be "incompatible

with his dignity, and the dignity of his nation"). This initial understanding was expressed by Alexander Hamilton in The Federalist No. 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind." James Madison and John Marshall assured states during the ratification process that this sovereign immunity would not be abrogated by the Constitution. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-24 (1934). *See also Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 483 (1987) (collecting sovereign immunity cases where the Court has relied on the statements of Hamilton, Madison and Marshall).

American courts treated governmental immunity from court processes as received law. In early decisions, this Court thought the doctrine so basic that little explanation needed to be given for its origins or scope. For example, in *United States v. McLemore*, 415 U.S. 286 (1846), the Court held, without citation to any authority, that "the government is not liable to be sued, except with its own consent, given by law." *Id.* at 288. Four years later, this Court again announced, "[n]o maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign . . . cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends." *Hill v. United States*, 50 U.S. 386, 389 (1850).

McLemore and *Hill* were about federal sovereign immunity. But similarly, the first time the Court relied on state sovereign immunity, it found it unnecessary to identify any authority for the doctrine. The Court simply noted that "[t]he general proposition [is] that a sovereign independent State is not suable, except by its own consent. This general proposition will not be controverted."[6] *Cohens v. Virginia*, 19 U.S. 264, 380 (1821). Decades later, in *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court concluded that the doctrine of state sovereign immunity was so thoroughly entrenched in the legal system that it was not necessary to examine the "reason or expediency" behind it. *Id.* at 21. State sovereign immunity was not to be limited by the courts; any exceptions to the doctrine could only come from the state legislature. *Id.* at 21.

As these cases make clear, immunity from suit for federal and state governments is an underlying legal assumption – a recognition that it is a fundamental, inherent aspect of sovereignty. This immunity was acknowledged in English law and the law of nations, and it was ensconced in the common law; its source is

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[6] In *Chisholm v. Georgia*, 2 U.S. 419 (1793), a divided Court concluded that the Constitution's grant of jurisdiction over controversies between a "State and a citizen of another State" permitted such citizens to sue states in federal court. Reaction to this decision was swift. The Eleventh Amendment was ratified, and the Court in *Cohens* held that states could not be sued in federal court absent consent or waiver. Importantly, the Eleventh Amendment was designed to overrule the Court's decision in *Chisholm* and "restore the original constitutional design." *Alden*, 527 U.S. at 722.

not the U.S. Constitution. *Alden*, 527 U.S. at 713 ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, . . . the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.").

Tribal immunity from suit shares the same origins as federal and state immunity. From the very beginning of this country, Indian tribes were viewed as sovereign "states" or "nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). Although Congress has power to alter tribal sovereignty, "unless and until Congress withdraws" a sovereign power, "the Indian community retains that authority in its earliest form." *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016). Among the "core aspects of sovereignty that tribes possess" is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills*, 134 S. Ct. at 2030.

Tribal sovereign immunity, vis-à-vis the states, was not altered by the adoption of the U.S. Constitution. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties") (internal citations omitted). Additionally, it is not subject to diminution by the States. *Bay Mills*, 134 S. Ct. at 2031. But because tribal sovereignty is subject

to the control of the United States, Congress is "at liberty to dispense with . . . tribal immunity or to limit it." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991). For Congress to abrogate tribal immunity, however, it must make its intention to do so unequivocally clear. *C & L Enters.*, 532 U.S. at 418. And while tribes can waive their own immunity, courts require that such waivers be clear and explicit. *Id.*

This Court has upheld tribal sovereign immunity for "well over a century." *Bay Mills*, 134 S. Ct. at 2040 (Sotomayor, J., concurring). The issue of tribal sovereign immunity first arose in this Court in *Parks v. Ross*, 52 U.S. 362 (1851). In that case, George Parks sued John Ross, Principal Chief of the Cherokee Nation, for debts allegedly incurred when the Cherokee were forcibly removed along the "Trail of Tears" from the southeastern United States to what is today the State of Oklahoma. *Id.* at 373-74. This Court held that Ross had acted as an officer of the Cherokee Nation, which precluded personal liability against him. *Id.* at 374.

In so holding, this Court invoked principles traditionally used to describe federal and state sovereign immunity, including establishing that the lawsuit was prohibited because the tribe was the real party in interest. *Id.* at 374 (noting that "the contract . . . was with the Cherokee nation," "[t]he money in [Ross'] possession was the money of the nation," and Ross had acted "within the scope of his authority"). The Court described the Cherokee as "a foreign and independent nation" and agreed that they were "governed by their

own laws and officers." *Id.* Since Congress had not given the Court any power to compel tribal officials to pay the debts of their nation (i.e., waived immunity), the suit could not succeed. *Id.*

In the years since *Parks*, this Court has said that the existence of tribal sovereign immunity is "settled law." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998). It includes all tribal activities, whether on-reservation or off-reservation, and regardless of whether the activity is governmental or commercial in nature. *Id.* at 757 (finding tribe immune from suit on a contract to buy stock executed outside of reservation boundaries). It protects a tribe from suits seeking declaratory or injunctive relief as well as money damages, *id.* at 760, *Santa Clara Pueblo*, 436 U.S. at 58-59, and from counterclaims, *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940). In short, the scope of tribal immunity is the same as federal and state sovereign immunity. *See, e.g., id.* at 512-13 (analogizing sovereign immunity of federal government to immunity of Indian tribes); *Lewis*, 137 S. Ct. at 1292 ("[t]here is no reason to depart from these general rules [of federal and state sovereign immunity] in the context of tribal sovereign immunity"); *Thebo*, 66 F. at 376 (Indian tribes "have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution"). *See also C & L Enters.*, 532 U.S. at 421 n.3 ("Instructive here is the law governing waivers of immunity by foreign sovereigns.").

II. THERE IS NO *IN REM* EXCEPTION TO SOVEREIGN IMMUNITY.

A. This Court Has Consistently Barred Actions Targeting Government Property.

Sovereign immunity bars not only lawsuits that name the sovereign, but all lawsuits where the government is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). In deciding whether a case is barred by sovereign immunity, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Lewis*, 137 S. Ct. at 1291. Consequently, a litigant cannot evade sovereign immunity by simply naming governmental officials as defendants if he seeks to compel government action, seize government property, or obtain money from the government coffers. *Larson*, 337 U.S. at 688 (barring suit seeking an injunction prohibiting the head of the War Assets Administration from delivering coal to anyone other than the plaintiff, because the suit was "in substance, a suit against the Government"); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per curiam) (dismissing lawsuit against governmental official because the "relief sought nominally against an officer is in fact against the sovereign" because, among other things, it would "cause . . . the disposition of property admittedly belonging to the United States").

Likewise, a litigant cannot avoid sovereign immunity by bringing an *in rem* proceeding where the *res*

is owned by a government. As early as 1868, this Court acknowledged that "there is no distinction between suits against the government directly, and suits against its property." *The Siren*, 74 U.S. 152, 154 (1868). *The Siren* involved a collision between ships at sea, which would normally result in an *in rem* admiralty[7] proceeding against the ship itself. But this Court held that sovereign immunity barred the suit because the United States claimed ownership of the vessel. *Id.* at 155 ("This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.").

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[7] Admiralty jurisdiction is a constitutionally distinct area, and admiralty cases involve personal, not real property. As a result, this Court has recognized a limited exception in admiralty cases by requiring the property to be within the possession of the government for sovereign immunity to bar an *in rem* suit. *See, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 504 (1998) (holding that court could resolve admiralty claims regarding an abandoned shipwreck, because the property in dispute was never in possession of the state). This exception has not, and should not, be applied outside of these narrow confines of admiralty jurisdiction. While possession may sometimes be considered the best evidence of a colorable claim to ownership over personal property, in the context of real property, the presence of a recording system for land titles is far more reliable.

In the 150-years since *The Siren*, it has become well-settled law that *in rem* proceedings over property owned by federal, state, or tribal governments are barred by sovereign immunity. For example, *In re New York (II)*, 256 U.S. 503 (1921), involved claims against The Queen City, a steam tug owned by the State of New York, which was allegedly responsible for the drowning death of an individual. This Court dismissed the lawsuit against the tug, reasoning:

> [I]t is uniformly held in this country that even in the case of municipal corporations . . . their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city. As Mr. Chief Justice Waite said, speaking for this court in *Klein v. New Orleans*, 99 U.S. 149, 150, 25 L. Ed. 430:
>
> > 'To permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself.'
>
> . . . .
>
> The principle . . . applies with even greater force to exempt public property of a state used and employed for public and governmental purposes.

In re New York (II), 256 U.S. at 511.

This Court also has repeatedly noted sovereign immunity prevents the enforcement of liens against

government-owned property absent a waiver. *United States v. Alabama*, 313 U.S. 274, 281 (1941). For example, in *Maricopa County v. Valley Bank of Phoenix*, 318 U.S. 357 (1943), state taxing authorities were precluded from foreclosing on a lien existing on federally owned land without a waiver of sovereign immunity. This Court stated that "even a proceeding against property in which the United States has an interest is a suit against the United States" that could not be maintained without its consent. *Id.* at 362.

More recently, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Coeur d'Alene Tribe sought a declaration that it owned the beneficial interest in submerged lands of navigable waters on its reservation, and an injunction preventing Idaho from taking action in violation of its rights. *Id.* at 265. This Court dismissed the suit, holding that it was the "functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. Although there was sharp disagreement as to whether it truly was equivalent, the Justices and parties all agreed "that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent." *See id.* (calling this proposition "common ground between the parties"); *id.* at 289 (O'Connor, J., concurring) ("A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest."); *id.* at 305 (Souter, J., dissenting) (noting that the Court had never permitted suits "ultimately quieting title . . . or limiting the affected government in any subsequent quiet title action"). *See*

also United States v. Nordic Village, Inc., 503 U.S. 30, 38 (1992) (rejecting "respondent's . . . argument that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity"); *Malone*, 369 U.S. at 646 ("suits against government agents, specifically affecting property in which the United States claimed an interest, [are] barred by the doctrine of sovereign immunity").

With respect to adverse possession, the protection of sovereign immunity has a particularly longstanding common law pedigree. Adverse possession violates the ancient maxim "*nullum tempus occurrit regi*," time does not run against the king. *See BP America Production v. Burton*, 549 U.S. 84, 96 (2006). William Blackstone himself recognized *nullum tempus* as an aspect of sovereign immunity, noting that "the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects." William Blackstone, *Commentaries on the Law of England* 247 (Tucker ed. 1803). This rule was incorporated into the American common law, *Block*, 461 U.S. at 294 (O'Connor, J., dissenting), and became a foundation for the general rule prohibiting adverse possession against the state. *See State v. Lombardo Bros. Mason Contractors*, 54 A.3d 1005, 1019 n.23 (Conn. 2012).

Although some states today have waived their immunity from adverse possession suits by statute, the majority do not. Paula R. Latovick, *Adverse Possession against the States: The Hornbooks Have it Wrong*, 29 Mich. J. L. Ref. 939, 945 (1996). Washington State, for example, prohibits adverse possession claims against

itself. Rev. Code Wash. § 7.28.090 (statutes creating claims to adverse possession under color of title and payment of taxes "shall not extend to lands or tenements owned by the United States or this state"); Rev. Code Wash. § 4.16.160 ("[N]o claim of right predicated upon the lapse of time shall ever be asserted against the state.").[8] Similarly, as discussed in the next section, the United States has refused to waive its immunity from adverse possession suits against its own property. *See* 28 U.S.C. § 2409a(n); 43 U.S.C. § 1068.

The reason the common law prohibits suits against sovereign land is clear. Seizure of any property in the hands of the sovereign violates its dignity and seizure of its land is an even greater violation. Ownership of land is core to a sovereign's service to the public. It is a crucial part of the governmental ability to protect its economy and culture. Our great public universities, railroads, highways, state and national parks, and military bases are all fruits of government land ownership. Allowing private litigants to threaten such land is no different from allowing them to threaten the sovereign itself.

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[8] *Gorman v. City of Woodinville*, 283 P.3d 1082 (Wash. 2012), held that the lapse of time prohibition did not apply to city property where the statute of limitations allegedly elapsed before the city acquired the property, but this was an interpretation of a state statute that does not affect this Court's determination of common law sovereign immunity.

B. Congress Has Legislated Based On The Understanding That Sovereign Immunity Protects Government Property.

The Judiciary is not alone in concluding that actions directed against government property are barred by sovereign immunity. Congressional statutes and hearings have long demonstrated that the Legislative Branch holds a similar view of the scope of sovereign immunity.

For example, in 1964, Congress passed legislation to establish the Public Land Law Review Commission. Pub. L. No. 88-606, 78 Stat. 982 (1964). The Commission was charged with making a comprehensive review of laws, policies and practices relating to public lands, and to recommend any necessary changes. *Id.* at § 4, 78 Stat. at 983. After five years of study, the Commission submitted a book-length report to Congress. *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (1970). Chapter 17 of that report, entitled "Trespass and Disputed Title," detailed that in disputes between the federal government and private citizens:

> Unless . . . the Government chooses to initiate litigation, it is virtually impossible for a private claimant to obtain a judicial resolution of title to lands which are claimed by the Federal Government. In any action brought against the Government to quiet title, i.e., to establish who the owner is, the Government has

> available to it the defense of sovereign immunity which it invariably asserts.

Id. at 261. The Commission recommended that Congress waive the federal government's sovereign immunity to enable quiet title actions to be brought against federal property, and it specifically recommended that this waiver include good faith claims based on adverse possession. *Id.*

Bills were quickly introduced in the Senate to implement many of the Commission's proposed changes, including the ones relating to disputed land titles. Senate Bill 579 would have allowed adverse possession claims against the United States if the land was occupied for not less than 20 years "by a person reasonably believing that he held title to such lands." *Hearing Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate, on S. 216, S. 579, and S. 721*, 92nd Cong., 1st Sess. at 4 (Sept. 30, 1971) (hereinafter *Sept. 30, 1971 Hearings*). Senate Bill 216 was drafted to allow *any* quiet title action to be brought against the United States. *Id.* at 1.

During hearings on these bills, the Departments of Justice, Interior, and Agriculture were unified in their opposition to Senate Bill 579. *Id.* at 2-5 (collecting formal agency letters). As one Department of Justice official testified, because of "the doctrine of sovereign immunity," adverse possession "has never been applicable to lands owned by the Federal Government," and without such protection the government would incur

considerable expense lest adverse possession "lead to the unjust enrichment of individuals at the expense of people of the United States." *Id.* at 21-22; *see id.* at 31-32 (Department of Agriculture official testifying to same). And these same agencies also opposed the broad wording of Senate Bill 216, instead advocating for a version drafted by the Department of Justice. Among other things, the Department of Justice's draft bill explicitly stated that adverse possession claims would not be permitted against the United States, excluded quiet title actions against lands that the United States held in trust for Indian tribes, provided a strict statute of limitations for all actions, and left discretion in the United States to determine whether, if an adverse judgment was entered against it, the government would return the property to the claimant or simply pay just compensation. *Id.* at 2-5, 21.

While Senate Bill 579 was not passed by Congress, Senate Bill 216, as modified by the Department of Justice's proposal, was adopted by Congress in 1972. It is known today as the Quiet Title Act.

Throughout the debate on the Quiet Title Act, Congress repeatedly stated that the Act was necessary because without a waiver of sovereign immunity litigants were prevented from establishing ownership of lands claimed by the government. *See, e.g., Sept. 30, 1971 Hearings* at 8 (Senator Church, who co-sponsored S. 216 and S. 579, noted that "[b]ecause of the common law doctrine of 'sovereign immunity,' the United States cannot now be sued in a land title action without giving its express consent"); *id.* at 20 (Assistant Attorney

General Shiro Kashiwa stating that "[u]nder existing law, the defense of sovereign immunity is a complete bar to action by a private litigant against the United States to adjudicate title to real property"). This justification was clearly expressed in both the House and Senate Reports. S. Rep. No. 92-575, 92nd Cong., 1st Sess. at 1-2 (1971) ("Because of the common law doctrine of 'sovereign immunity,' the United States cannot now be sued in a land title action without giving its express consent."); H.R. Rep. No. 92-1559, at 6 (1972) (same). When Congress waived this immunity with the Quiet Title Act, it did so only after carving out the important exceptions requested by federal agencies. Adverse possession claims would not be allowed. 28 U.S.C. § 2409a(n). Indian trust or restricted lands would not be affected. 28 U.S.C. § 2409a(a). And the United States could choose whether to return the land or simply provide compensation if the claimant was successful. 28 U.S.C. § 2409a(b).

This legislative history demonstrates that Congress understands that sovereign immunity protects governments from quiet title actions and that without a waiver, such litigants may have no remedy. It also demonstrates that when Congress has granted waivers for the federal government's immunity, it has not seen fit to do so for adverse possessors without color of title,[9] it has protected Indian lands, and it has not

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[9] As noted at 5-6, *supra*, Congress has waived sovereign immunity for only a narrow category of adverse possession claims: litigants with color of title. And even then, there are many barriers to recovery. *See, e.g.*, 43 U.S.C. § 1068 (requiring both

permitted successful litigants to force the United States to relinquish the property in question.

III. CONGRESS IS THE APPROPRIATE BODY TO WEIGH COMPETING POLICY INTERESTS.

In the past, this Court has questioned "the wisdom of perpetuating the doctrine [of tribal sovereign immunity]." *Kiowa*, 523 U.S. at 758. Its most recent decision on the subject, however, does not evidence a similar skepticism about the doctrine's usefulness or vitality. *Bay Mills*, 134 S. Ct. at 2030-32, 2036-37. And even when skeptical, this Court has rightly refrained from carving out exceptions to tribal sovereign immunity. It has done so out of recognition that the Constitution vests the power to abrogate or diminish tribal sovereignty – including sovereign immunity – in the political branches of the federal government. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) (through the Treaty Clause and the Indian Commerce Clause "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes"). The Court has therefore repeatedly recognized that "it is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity." *Bay Mills*,

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combination of good faith and valuable improvements or cultivation, or possession prior to 1901 and payment of taxes). In other statutes, such as the Public Land Sale Act, Pub. L. No. 90-516, 82 Stat. 870 (1968), Congress allowed federal property that had been subject to "unintentional trespass" to be sold if the land was not otherwise needed, but this law was only in effect for three years.

134 S. Ct. at 2037; *see Kiowa*, 523 U.S. at 758 ("[W]e defer to the role Congress may wish to exercise in this important judgment."); *Potawatomi*, 498 U.S. at 510 (because "Congress has consistently reiterated its approval of the immunity doctrine . . . we are not disposed to modify the long-established principle of tribal sovereign immunity").

There is no reason to change that bedrock conclusion now. Doing so would disrupt substantial reliance interests and would violate the doctrine of *stare decisis*. *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996) (*stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," and therefore, even in constitutional cases, the court has "always required a departure from precedent to be supported by some special justification"); *United States v. Maine*, 420 U.S. 515, 527-28 & n.9 (1975) (*stare decisis* has "particular force" in situations where entities have engaged in economic activity based on the Court's prior decisions). This Court recognized this very fact, only four short years ago. *Bay Mills*, 134 S. Ct. at 2036 (discussing the "special force" of *stare decisis* in tribal sovereign immunity).

Congress has carefully exercised its authority to revise the scope of tribal sovereign immunity for more than 100 years. As early as 1909, for example, Congress expressly authorized specific suits against six Indian tribes. Act of May 29, 1908, ch. 216, § 2, 35 Stat. 444, 444-45 (Menominee); *id.* at § 5, 35 Stat. at 445

(Choctaw); *id.* at § 16, 35 Stat. at 451 (Choctaw and Chickasaw); *id.* at § 26, 35 Stat. at 457 (Creek);[10] *id.* at § 27, 35 Stat. at 457 (Mississippi Choctaw).

As this Court has already recognized, in the years following *Kiowa*, Congress continued to exercise its power over Indian affairs by enacting legislation that either preserved or abrogated tribal sovereign immunity. *Bay Mills*, 134 S. Ct. at 2038 (collecting statutes). Some of these statutes addressed specific tribes or narrow factual circumstances. *E.g.*, Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(a)(1), 117 Stat. 782, 795 (2003) (waiving both the United States' and the Tribe's immunity from suit for certain non-monetary claims under the settlement agreement). But Congress also considered and rejected broad abrogations of immunity that would have paralleled abrogations granted by the United States in the Tucker Act and the Federal Tort Claims Act. *Bay Mills*, 134 S. Ct. at 2038 (citing S. 2299, 105th Cong., 2d Sess. (1998); S. 2302, 105th Cong., 2d Sess. (1998)).

After this Court's 2013 decision in *Bay Mills*, Congress continued to actively shape the scope of tribal sovereign immunity. For example, Congress expressly preserved tribal immunity in the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322,

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[10] This particular section allowed Clarence Turner to sue the Creek Nation for damages resulting from an 1890 incident in which a group of Creek citizens destroyed his fence. The Court of Claims dismissed Turner's claims for failure to state a claim, and this Court affirmed. *Turner v. United States*, 51 Ct. Cl. 125 (1916), *aff'd*, 248 U.S. 354 (1919).

§ 1121(3), 130 Stat. 1628 (2016) (providing that "[t]he Secretary shall not require an Indian tribe to waive the sovereign immunity of the Indian tribe as a condition to entering into a cost-sharing agreement under this subsection"). Conversely, Congress abrogated tribal sovereign immunity in the Bill Williams River Water Rights Settlement Act of 2014, Pub. L. No. 113-223, § 7(b), 128 Stat. 2096, 2107-08 (2014) (stating that for any civil action relating "directly to the interpretation or enforcement of this Act" or the various agreements referred to therein, "the Tribe and the United States . . . may be named as a party or joined in the civil action" and "any claim by the Tribe or the United States . . . to sovereign immunity from the civil action is waived").

Congress also continues to stay abreast of the decisions of this Court and lower federal courts. Recently, following a dispute regarding the assertion of tribal sovereign immunity in a patent proceeding, Congress held hearings with witnesses testifying for and against various proposals that would waive such immunity. *See generally Sovereign Immunity and the Intellectual Property System*: *Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 7, 2017); S. 1948, 115th Cong. (S. McCaskill sponsor) (bill would abrogate tribal sovereign immunity in certain patent actions).

Congress' decision to abrogate in certain situations and not in others weighs heavily against the Washington Supreme Court's decision to take it upon

itself to carve out an exception to tribal sovereign immunity for *in rem* actions. *See Bay Mills*, 134 S. Ct. at 2031 (reiterating that "tribal immunity is a matter of federal law and is not subject to diminution by the States") (internal quotations and citations omitted). Consistent "approval of the immunity doctrine . . . reflect[s] Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotations omitted). Congress is the body with power over Indian affairs, and these are policy judgments best left to that body.

IV. THE CONGRESSIONAL POLICY OF RESTORING THE TRIBAL LAND BASE ALSO COUNSELS AGAINST AN EXCEPTION TO SOVEREIGN IMMUNITY FOR TRIBAL LAND.

The reasons that sovereign immunity protects against involuntary loss of land apply with particular force to tribal nations. The tragic history of tribal land loss is well known. While much of this loss came from public acts, much was also the result of private illegal occupation, fraudulent foreclosures, and tax sales of individually owned allotments. This case, in fact, stems from the Upper Skagit Tribe's own 150-year struggle to rebuild its land base.

Protecting tribal land has long been part of federal policy. Therefore, while sovereign immunity protects

all sovereigns from private suits claiming their property, for tribal nations this is a matter of their very survival, and for the United States a matter of federal obligation.

A. Tribes Have Been Particularly Scarred By Illegal Occupation Of Their Land.

"Land forms the basis for social, cultural, religious, political, and economic life for American Indian nations." *Cohen's Handbook of Federal Indian Law* § 15.01, at 994-95 (Nell Jessup Newton ed. 2012). "We are the land" is a sentiment shared by many tribes. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615, 1640 (2000) (citation omitted). Land is intimately linked to the origin stories, the religious practice, and the very identity of tribal peoples. *Id.* The struggle to preserve aboriginal lands, therefore, is a central part of Native struggles for self-preservation and self-determination.

Until recently, this struggle was marked solely by loss. Chief Justice John Marshall remarked on this tragic history as early as 1831, noting in *Cherokee Nation* that "[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." 30 U.S. at 15. The Cherokee Nation, he wrote, was once in "uncontrolled possession of an ample domain," but had "yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue." *Id.* "To preserve this remnant," he continued, "the present application is made." *Id.*

Although Justice Marshall wrote of land lost in treaties, much land loss began with illegal private occupation. The Cherokee cases themselves stemmed from the illegal claims of Georgia settlers to Cherokee lands and gold. *See* Stephen Breyer, ***Making Our Democracy Work: A Judge's View*** 23-24 (2010). Although this Court held Georgia's claims "repugnant to the Constitution, laws, and treaties of the United States," *Worcester*, 31 U.S. at 561, the federal government ultimately bowed before Georgia's resistance, signing the unauthorized treaty that led to the Cherokee Trail of Tears. Breyer, *supra*, at 29-30. The Creek Trail of Tears began in this way as well, when, after the Creek Nation signed a treaty permitting Creek households to take allotments or voluntarily move West, "white persons, in large numbers, commenced flocking into the country, in order to select and take possession of the best lands," and "Indians were driven from their habitations and their homes by these lawless people." H.R. Rep. No. 31-37, at 25 (1851). Even as the U.S. acquired more and more land by treaty, commissioners complained that they still could not prevent land speculators from using "the most dishonorable expedients . . . to dispossess the Indians." Annual Report of Commissioner of Indian Affairs, Sen. Exec. Doc. 34-5 (Nov. 22, 1856).

Allotment to individual Indians spurred even more illegal acquisitions. Not satisfied with the land officially opened to settlement, non-Indians entered into illegal leases, and claimed land from fraudulent foreclosures and tax sales. *See, e.g.*, Brief for Historical and Legal Scholars, *Nebraska v. Parker*, 136 S. Ct. 1072

(2016) at 28-29 (describing history of the Omaha); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 Tulsa L. Rev. 21, 25-26 (2004) (describing illegal tax foreclosures on Odawa and Ojibwa allotments). Efforts to acquire Indian lands could be even more deadly. Private citizens burned the Odawa and Ojibwa allottees of Burt Lake out of their homes after the government declared tax foreclosures of their land invalid, Singel & Fletcher, *supra*, at 26-27, while Osage allottees suffered dozens of murders to acquire their valuable oil lands. *See* David Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI* (2017).

Until recently, tribal nations experienced generation after generation of loss of ancestral homeland. Much of this loss started with illegal occupation or acquisition by private individuals. Reversing that history is not just about recovering land, it is about recovering the culture, identity, and autonomy that went with it.

B. The Disputed Land Here Is Part Of The Upper Skagit Tribe's Own History Of Land Loss.

On Respondents' part, of course, their claim to the land is not part of this tragic history. But for the Upper Skagit Tribe, it is. The Tribe was left landless by the Treaty of Point Elliott in 1855, and struggled for over a century to protect its people and culture without a reservation. Since the 1970s, the Tribe has gradually bought back about 500 acres (less than a square mile)

within its original homelands. This parcel is part of those lands.

The Tribe is the political successor to confederated Coast Salish peoples who have lived around the upper Samish and Skagit Rivers for thousands of years. *See* Upper Skagit Tribal Council, *A Petition to the U.S. Secretary of the Interior to Proclaim an Upper Skagit Reservation* Fig. 2 (Feb. 18, 1981) (hereinafter Reservation Petition) (map of territory of Upper Skagit aboriginal bands). The Upper Skagit ceded its lands in the Treaty of Point Elliott, believing it would get protected land and money in return. *See* Treaty with the Duwamish etc., 12 Stat. 927 (1855); AIPRC Report at 182. But although 23 tribes signed that treaty, the United States created only two reservations, and they were far south of the Upper Skagit territory. *Id.* Most tribal members chose to remain on their aboriginal lands, even though they were unprotected from white encroachment there. *See United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974); Miller, *supra*, at 94-95.

Nevertheless, the Upper Skagit continued as a tribal community. In 1913, Congress appropriated up to $250 for the Upper Skagit to purchase land that they were already using as a tribal cemetery. 38 Stat. 77, 101 (1913). In 1916, they built an Indian Shaker Church, which became a center of tribal coordination. Miller, *supra*, at 96. The Tribe participated in claims against the United States for failure to pay monies due under the Treaty of Point Elliott. *Duwamish v. United States*, 79 Ct. Cl. 530, 533 (1934); *Upper Skagit Tribe v.*

United States, 13 Ind. Cl. Comm'n 583 (1964). Tribal members also persistently asserted their treaty rights to fish free from onerous and discriminating state law restrictions. Miller, *supra*, at 96-97 (noting that without a reservation, their fishing rights began being restricted in 1897, and several Upper Skagit members were arrested for fishing in the 1960s). In 1974, Judge Boldt held that the Upper Skagit retained off-reservation fishing rights under the Treaty of Point Elliott. *United States v. Washington*, 384 F. Supp. 312, 400 (W.D. Wash. 1974). Soon after, the United States finally formally agreed that the Upper Skagit was a recognized Indian tribe and had been under federal jurisdiction since at least 1913. *Reservation Petition*, *supra*, at 5.

The Upper Skagit have worked continuously to restore the tribal land base. *See Reservation Petition*, *supra*, at 11-17 (describing efforts to purchase land between 1974 and 1981). In 1981, the United States formally recognized a 74-acre reservation. 46 Fed. Reg. 46,681 (Sept. 21, 1981). Since that time, the Upper Skagit have purchased approximately 500 acres of mostly contiguous land and have succeeded in having much of this land taken into trust. Miller, *supra*, at 98. The disputed property in this case adjoins that trust land, borders a tribal cemetery, and is believed to include the remains of tribal members lost to waves of smallpox that decimated the Tribe.

Respondents claim to view the disputed land as part of their "backyard," but for the Tribe it is much more. It is part of the homeland that was taken from

them long ago. Acquiring this land is part of their long journey to get at least a small portion of that homeland back.

C. Federal Law And Policy Has Long Prohibited Private Acquisitions Of Tribal Land.

For decades, the United States has recognized that restoring the tribal land base is part of its trust obligations. For hundreds of years before that, federal law has forbidden private acquisitions of tribal land. Although these laws do not apply to the off-reservation fee land here, the policy surely does. Particularly for Indian tribes, in other words, there is no exception to the federal common law immunity prohibiting private suits claiming sovereign land.

Federal law has always condemned private acquisitions of tribal land. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). The earliest treaties provided for punishment of those settling on tribal land without federal consent.[11] The very first Congress prohibited private acquisitions of Indian land in the Trade and Intercourse Act, 1 Stat. 137-183 § 4 (1790). Although the United States often failed to enforce the law, it has remained in effect ever since. *See* 25 U.S.C. § 177.

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[11] *See, e.g.*, Treaty with the Wyandot etc., 7 Stat. 49, Art. VI (1795); Treaty with the Creeks, 7 Stat. 35, Art. VI (1790); Treaty with the Choctaws, 7 Stat. 22, Art. IV (1786); Treaty with Chickasaws, 7 Stat. 24, Art. IV (1786); Treaty with Cherokees, 7 Stat. 18, Art. V (1785).

Beginning with the 1934 Indian Reorganization Act, federal policy has been to protect and enhance the tribal land base. Act of June 18, 1934, 48 Stat. 984; *see* H.R. Rep. No. 73-184 (1934) (declaring purpose of act to "conserve and develop Indian lands" and purchase land for landless Indians); *Lara*, 541 U.S. at 202 (noting current federal policy of "protection of the tribal land base"). The Act applies perpetual trust status to all lands still in trust and authorizes return to tribal ownership of any unsold surplus lands and acquisition of lands to consolidate the tribal land base. 48 Stat. 984, §§ 2-3. These laws remain in effect, 25 U.S.C. §§ 5101-5106, reflecting Congress' determination that "a substantial tribal land base [is] essential to the existence of tribal society and culture." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 279 (1985) (quoting *Cohen's Handbook of Federal Indian Lau* 510 (1982 ed.).

The United States continues to pursue this policy. The Indian Land Consolidation Act of 1983 and the American Indian Probate Reform Act of 2004 both seek to consolidate the tribal land base by facilitating tribal acquisition of interests in lands. Pub. L. No. 97-459, 96 Stat. 2517 (1983); Pub. L. No. 108-374, 118 Stat. 1773 (Oct. 27, 2004), both *codified as amended at* 25 U.S.C. §§ 2201-2221. Numerous congressional and administrative acts have recognized new reservations for landless tribes. *See, e.g.*, Pub. L. No. 103-377, 108 Stat. 3501 (1994) (taking land into trust as initial reservation of the Mohegan Nation). As declared in a 2012 Report from the Senate Committee on Indian Affairs, "[r]eversing the history and circumstances of land loss

and the economic, social, and cultural consequences of that loss are at the core of the government's federal trust responsibility toward Indian tribes." S. Rep. No. 112-166, *4 (2012).

Permitting private parties like Respondents to bring claims against tribal land, therefore, would not only violate established rules of common law sovereign immunity, it would violate the federal policy of protecting tribal land and reversing tribal land loss.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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